85-1922

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Petitioner,

vs.

RICHARD RAYMOND DeANGELO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT.

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QUESTION PRESENTED FOR REVIEW

I

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY CONSTRUED THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND OREGON V. MATHIASON, 429 U.S. 492 (1977) AS WELL AS THE SIXTH AMENDMENT RIGHT TO COUNSEL AND UNITED STATES V. GOEVEIA, 467 U.S. 180 (1984) BY HOLDING THAT A DEFENDANT WHO VOLUNTARILY ENTERS A HOSPITAL, BECAUSE HE IS SUFFERING FROM A GUN SHOT WOUND, IS IN CUSTODY, AND MUST BE ADVISED OF HIS RIGHT AGAINST SELF-INCRIMINATION, AND HIS RIGHT TO COUNSEL WHEN QUESTIONED BY HIS FRIEND, AN INDIVIDUAL CITIZEN, FOR THE BENEFIT OF LAW ENFORCEMENT OFFICERS?

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PREFACE

The Petitioner, Louie L. Wainwright, in his capacity of Secretary to the Florida Department of Correction, was the Appellee in the United States Circuit Court of Appeals, Eleventh Circuit. The Respondent, Richard Raymond DeAngelo, was the Appellant below. In this brief, the parties will be referred to as they appear before this Court.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A 1 - A 57.

OPINIONS BELOW

The opinion of the Eleventh Circuit of Appeals was rendered February 10, 1986. It is not yet reported, but is reproduced in Petitioner's Appendix at A 1 - A17. Rehearing was denied on March 21, 1986. (A 18). The United States Magistrate's Review and Recommendation of December 21, 1984, and the United States District Judge's Order of Dismissal of December 31, 1984, are reproduced at A19 - A34 . The Fourth District Court of Appeal's opinion is reported at 403 So.2d 573 (Fla. 4th DCA 1981), and reproduced at A37 - A 56 .

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion of the Eleventh Circuit was rendered February 10, 1986, reversing and remanding the case for further consideration by the District Court. That court denied a timely motion for

rehearing on March 21, 1986. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. §1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against herself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions,

> the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

RICHARD RAYMOND DeANGELO (Hereinafter referred to as Respondent) was charged by Indictment with first degree murder and Armed Robbery in the Seventeenth Judicial Circuit in and for Broward County, Florida.

On April 22, 1978, by prearrangement Narbey Keshishian and Neil Prince agreed to meet Leonard Leon at a specified location to effect the purchase of a large amount of marijuana. Upon

Keshishian and Princes' arrival at the location Leonard Leon took them to a large warehouse complex. Upon entering a particulary warehouse, they met DeAngelo. Keshishian asked DeAngelo: "Where's the pot?", whereupon DeAngelo asked: "Where's the money?" Keshishian left the warehouse, obtained $28,000 and returned. When he re-entered the warehouse Leon pulled an automatic pistol and DeAngelo drew a revolver and a rifle and ordered Leon to search Prince and Keshiahian. Shortly thereafter shots were fired and Keshishian ran from the warehouse to Oakland Park Boulevard where he was picked up by Pannuccio, a partner with Keshishian and Prince in the proposed purchase. Keshishian told Pannaccio they had been ripped off and eventually Pannuccio notified the police

that Prince was missing. As a result of the shooting Leonard Leon and Prince died; DeAngelo was wounded and ended up in Broward General Hospital.

Gary Leon, the brother of Leondard Leon, testified that he was acquainted with Respondent because his brother was good friends with Respondent. Gary testified that on his own desire and accord, he went to visit Respondent in the hospital to find out from Respondent the circumstances surrounding his brother's death. The police realizing that Gary was going to the hospital anyway, to see Respondent--a suspect at the time--asked Gary if he would mind wearing an electronic eaves dropping device to preserve the conversation. Gary Leon spoke to Respondent in the hospital room. Respondent did not know the conversation was being recorded. Gary testified that he was not satisfied with Respondent's explanation to him during the first visit to the hospital. The police because

they had Gary Leon's cooperation to record the conversation, asked Gary to "hit on specific areas" during the second conversation with Respondent. At one of Gary's two hospital visits, Respondent told him that he (Respondent) and Leonard were going to shake down Keshishian and Prince, i.e., take their money and keep the drugs. Respondent also told Gary Leon about the shooting, admitting he (Respondent) had a gun and had fired it during the incident.

At the time the statements were made, Respondent was not in custody nor was he under arrest. Respondent was in the hospital, recuperating from wounds, but he was not in the hospital under police custody. Respondent had not been read his Miranda[1] warnings, however,

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[1] Miranda v. Arizona, 384 U.S. 436(1966).

defense counsel later conceded at trial that this was not a custodial interrogation. (See pertinent passage reproduced at A .)

At trial, Respondent objected to the admission of either the tapes of the conversations with Gary Leon[2] or to any testimony by Leon regarding their conversations. The state argued that Oregon v. Mathiason, 429 U.S. 492 (1977) did not require the giving of Miranda warnings in the instant case, in that there was no custodial interrogation and that Gary Leon, who knew Respondent, was going to the hospital on his own desire and accord anyway, to find out from Respondent the circumstances surrounding his brother's death.[3]

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[2] The tapes turned out to be inaudible.

[3] Thus, contrary to the Court of Appeals' opinion, a formal suppression hearing, with testimony, was held by the state trial court.

The trial court, after hearing all the arguments from both sides, ruled that the tapes were inadmissible, but that Gary Leon's testimony was admissible under Hoffa v. United States, 385 U.S. 293, (1966). In June of 1979 Respondent was convicted of both counts and sentenced to a mandatory twenty-five(25) years in prison.

After the conviction a timely appeal was taken to the Fourth District Court of Appeal of Florida dealing primarily with the issue of the statements made while Petitioner was hospitalized. In September of 1981, the Fourth District Court of Appeal in a very extensive and clear opinion affirmed the conviction of the Petitioner in DeAngelo v. State, 403 So. 2d 573 (Fla. 4th DCA 1981).[4] The

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[4] See A 37- A56.

Fourth District Court, after reviewing the trial transcripts, agreed with the trial court as to the admissibility of Leon's testimony and stated:

> In the present case neither side presented evidence that the general investigatory process had ended. Moreover, it is clear that DeAngelo was not in custody when Gary Leon visited him in the hospital, and the police did not, through Gary Leon, conduct any interrogation designed to elicit a confession from DeAngelo. Gary Leon, while stating (a) that the police knew he was visiting DeAngelo and that they told him "to keep a running conversation to gather information" and (b) that he told the police what he saw and heard during the second visit, consistently maintained his purpose in visiting DeAngelo was to find out for himself the circumstances of his brother's death. Under these circumstances the investigation was still general and had not focused on DeAngelo; thus DeAngelo did not have a right, under Escobedo, to consult with counsel before talking with Gary Leon.

Further, the Fourth District Court of Appeal found that:

> [N]o Fifth Amendment violation occurred during the Gary Leon--DeAngelo conversations because when Leon visited and spoke with DeAngelo no one excercised any coercion over DeAngelo, and DeAngelo's statements were purely voluntary. Since there was no compulsion, DeAngelo's Fifth Amendment privilege against self-incrimination was not violated. Odom v. State, So.2d (Fla. 1980), Case No. 50,575, Opinion filed July 23, 1981. We conclude that the trial court acted properly in admitting Gary Leon's testimony concerning incriminating statements DeAngelo voluntarily made to Leon.

On October 14, 1982, Respondent pro se, filed a Petition for Habeas Corpus relief in the United States District Court, Southern District of Florida. A Review and Recommendation was filed by the Magistrate on December 21, 1984, recommending the denial and dismissal of the Petition for Writ

of Habeas Corpus. On December 31, 1984, the District Judge, Judge Norman Roettger, after conducting an independent de novo review of the entire record, entered his Order dismissing the Petition in accordance with the Recommendation of the Magistrate.

Respondent appealed the denial of his Petition. The Eleventh Circuit Court of Appeals by its February 10, 1986, opinion reversed the District Court's decision to the extent that "the district court accorded the §2254(d) presumption to the trial court's decision that DeAngelo's statements were voluntary under Hoffa v. United States, 385 U.S. 293 (1966)". And remanded for the District Court to enter findings as to whether DeAngelo had the right to be represented by counsel at the time the conversations took place.

Because Petitioner maintains the Court of Appeals' opinion sub judice ignores and is in conflict with this Court's opinions in Oregon v. Mathiason, 429 U.S. 492 (1977); Hoffa v. United States, 385 U.S. 293 (1966); Moran v. Burbine, 475 U.S.___, 38Cr.L. 3187 (Case No. 84-1485, decided March 20, 1986); and United States v. Gouveia, 467 U.S. 180 (1984), Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals, Eleventh Circuit (hereinafter Court of Appeals) remanded the case to the District Court to determine whether "the investigation had focused on DeAngelo at the time of the first or second visit

or both," finding that such information was "pertinent to whether the conversations were 'custodial interrogations' of DeAngelo" or "efforts by Leon to learn the details of his brother's death in a nonadversarial atmosphere." (See A 17.) Petitioner submits that the Court of Appeals statement:

> The conduct of the police in this case could qualify as an effort to circumvent DeAngelo's sixth and fifth amendment rights after the police had decided to arrest him. (A16)

implies a defendant who voluntarily enters a hospital because he is suffering from a gun shot wound is in custody and must be advised of his right to counsel when questioned by an individual citizen for the benefit of law enforcement officers. Such a holding is contrary to this Court's pronouncements in Hoffa v. United States,

385 U.S. 293, (1966).

The facts in this case are clear that when Gary Leon visited Respondent at the hospital and engaged him in conversation, he was doing so of his own volition to determine how his brother had been killed. As a secondary purpose, Gary Leon agreed to wear a body bug for the benefit of the police. The record also establishes that Respondent talked with Gary Leon as acquaintances that they were, and not under threats or compulsion. Ever since Miranda v. Arizona, 384 U.S. 436, (1966) it has been well recognized that in order for the Fifth Amendment's right against self-incrimination to be involved when statements are made, there must be some kind of compulsion exerted on the individual. The fact that Respondent erroneously believed that the conversa-

tion was with "a friend" who could be trusted not to reveal it, does not render the statement involuntary. Respondent has not argued that his conversation was forced; he simply complains that his statements were not voluntary because they were made without Respondent being forewarned of his "rights" before the interrogation began by Gary Leon. Since Respondent had no reason to think he was restrained in any manner, and since his remarks were uttered in a context completely free from coercion, there is no basis for an inference of a custodial interrogation. It is important to point out that defense counsel, at trial, conceded this was not a custodial interrogation. There is no occasion to require Miranda warnings or to invoke Miranda's exclusionary sanction, unless one speaks

while undergoing custodial interrogation. If Respondent was under no coercion at the time he made the incriminating statements to Leon, and was clearly not in custody, it is irrelevant whether he was a primary suspect or the suspect at the time he was visited by Gary Leon. In Oregon v. Mathiason, supra, this Court held that Miranda warnings need not be given by the police simply "because the questioned person is one whom the police suspect." And more specific that the mere fact that the questioned person is one whom the police suspect, does not turn the conversation into a custodial interrogation. "Simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" 429 U.S. at 495.

Furthermore, like in Hoffa v. United States, supra, in the present case, no claim can be made that Respondent's incriminating statements were the product of any sort of coercion, legal or factual. Respondent's conversations with Gary Leon were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case. Hoffa v. United States, 385 U.S. at 304.

The Court of Appeals opinion also states:

> If the information gleaned by Leon the first time ended the general investigation phase, as is highly possible, the second conversation was accusatory in nature... These facts, in conjunction, arguably may rise to a violation similar to that in United States v. Henry, 447 U.S. 264 (1980)....(A).

Henry involved a violation of a defendant's Sixth Amendment right to counsel by a police informant's eliciting of a confession from the defendant after he had been indicted and was being held in the same jail cell as the informant. The facts in this case are clear, Respondent was in the hospital voluntarily due to his gun shot wound arising out of the instant criminal offense. Respondent was not under indictment, information, or even under arrest or any kind of legal restraint at the time he made the statements to Gary Leon. It is now settled law that the Sixth Amendment's right to counsel does not attach until after initiation of formal charges. See: Moran v. Burbine, 475 U.S.__, 38 Cr.L. 3187 (Case No. 84-1485, decided March 20, 1986); United States v. Gouveia, 467 U.S. 180, (1984); Kirby

v. Illinois, 406 U.S. 682,(1972). Therefore, since Respondent had not been arrested or indicted at the time he made the incriminating statement, his Sixth Amendment right to counsel was not violated under the facts of this case.

Additionally, contrary to the Court of Appeals' statement as above cited, law enforcement officers are not obliged to terminate an investigation once probable cause is established. The presence of probable cause is no guarantee that sufficient evidence exists to support a criminal conviction. This Court in Hoffa, supra, 385 U.S. at 310 held:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amend-

> ment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

See also: United States v. Gray, 565 F.2d 881 (5th Cir.), cert. denied 435 U.S. 955, (1978). Further, this Court in Gouveia, supra, 81 L.Ed.2d at 155, stated the Court has never held that the right to counsel attaches at the time of arrest, but rather that:

> [T]he right to counsel attaches at the initiation of adversary judicial criminal proceedings... It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. ..."

Thus, it is clear that in the instant case the investigation had just began when the police heard Respondent's

statements. As this Court held in U.S. v. Gouveia, supra, it does not matter whether Respondent was the primary suspect at the time he made the statements to Gary Leon. The fact is that since no arrest had been made, and no charges had been filed in this case, the Sixth Amendment right to counsel had not attached. Further, since Respondent was not in custody, and no coercion has been shown, there was no need for Gary Leon to read Respondent the Miranda rights, and no Fifth Amendment violation exists under the facts of this case. Thus Respondent's statements were properly admitted at trial since the Sixth Amendment right to counsel had not attached. Maine v. Moulton, __U.S.__, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

CONCLUSION

Petitioner has sought to present

to this Court a substantial basis upon which to conclude that the opinion below is deserving of being reviewed by the United States Supreme Court, in that the Court of Appeals departed from this Court's interpretation of the Fifth and Sixth Amendments to the United States Constitution, and in so doing fundamentally misconceived the nature of the right against self-incrimination and the right to counsel. There is a solid jurisdictional basis predicated upon conflict between the opinion under review and several opinions rendered by this Honorable Court. Further there are substantial questions of federal law that have serious nationwide ramification because the Court of Appeals' opinion places great limitation on the police's investigative powers. There are no collateral issues contained in

the instant factual pattern which could have effect of diverting this Court's attention away from the issues herein presented. On the basis of the above, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Richard Raymond DeANGELO,
Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT,
Respondent-Appellee.

No. 85-5140

United States Court of Appeals,
Eleventh Circuit.

Feb. 10, 1986.

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD,* Senior District Judge.

HENDERSON, Circuit Judge:

This appeal centers on two seperate conversations that took place in the hospital room of the petitioner-appellant, Richard Raymond DeAngelo. The

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

talks, which involved DeAngelo and an acquaintance, Gary Leon, concerned a shooting in which DeAngelo was seriously injured and Leon's brother, Leonard, was killed.

In April, 1978, after an apparent drug deal went sour, a shoot-out ensued that resulted in injury to DeAngelo and the death of Leonard Leon. DeAngelo was taken to a nearby hospital in serious condition, where he was questioned by police officers without first having been advised of his rights. Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966). Nine days after the shooting, Gary Leon went to DeAngelo's hospital room wearing a body wire provided by the local police. Gary questioned DeAngelo about the shooting and the circumstances of his brother's

demise. The tapes of this talk, however, proved to be inaudible. Two days later--eleven days after the shooting--Gary Leon returned to DeAngelo's hospital room and again spoke with him about the shoot-out. Once again Gary Leon wore a concealed body wire and once again the tapes were inaudible. DeAngelo, who was under neither arrest nor police guard during the time of these two conversations, subsequently was arrested and tried for first degree murder and armed robbery.

At DeAngelo's trial the state sought to introduce the tapes and also Gary Leon's testimony about the two conversations. The admissibility of this evidence was not raised until after the commencement of the trial. With the jury excluded from the courtroom, the state trial court heard a proffer of

facts and argument from both sides. No formal hearing was held nor was there any testimony on the suppression issue. The trial judge ruled that the tapes were inadmissible regardless of their clarity. He also held, however, that under Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), Gary Leon's testimony with respect to the two conversations was admissible. Leon was then called as a witness for the state and apparently testified that DeAngelo made incriminating statements to him in one or both of the conversations.[1] DeAngelo subsequently was con-

[1] The transcript of the evidence in DeAngelo's trial, including the testimony of Gary Leon, was not available to the magistrate or the district court, nor is it a part of the record on appeal. The transcript of the hearing on the motion to suppress Leon's testimony was furnished to the district court by DeAngelo and is in the record before us.

victed of first degree murder and armed robbery.

The conviction was appealed to the Florida Court of Appeal, which denied relief. DeAngelo v. Wainwright, 403 So.2d 573. (Fla.Dist.Ct.App.1981). DeAngelo's appeal to the Florida Supreme Court was likewise rejected. He then filed this habeas corpus action in the United States District Court for the Southern District of Florida. A federal magistrate reviewed the record and issued a report finding that a hearing was not necessary and recommended that DeAngelo's petition be denied. The district court adopted the magistrate's report and recommendation. DeAngelo appeals that denial.

[1] 28 U.S.C. § 2254(d) requires a federal habeas court to apply a presumption of correctness to the state

court's factual findings unless one of seven conditions contained in § 2254(d) mandates a separate federal evidentiary hearing. Hearn v. James, 677 F.2d 841, 844 (11th Cir.1982). Legal questions or mixed questions of law and fact, however, are not subject to this presumption. Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 1306, 71 L.Ed.2d 480, 486 (1982)(per curiam).

Although it is not clear whether the district court accorded the § 2254(d) presumption to the trial court's decision that DeAngelo's statements were voluntary under Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), it appears that such was the case. To the extent that the district court deferred to this presumption, we reverse. In the recent case of Miller v. Fenton, __U.S.__, 106 S.Ct. 445,

88 L.Ed.2d 405 (1985), rev'g. 741 F.2d 1456 (3d Cir.1984), the Supreme Court of the United States held that whether a statement "was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination," and is not subject to the § 2254(d) presumption of correctness. Id. at ___, 106 S.Ct. at 451.

[2] The district court, relying on Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), held that a state prisoner is not entitled to federal habeas corpus relief if the claim is fully and fairly litigated in the state court. In Stone, the Supreme Court was concerned with a fourth amendment violation. The district court would expand this reasoning, by analogy, to fifth and sixth amendment claims as

well. We disagree with this approach.

Faced with the opportunity to do so, this circuit specifically has refused to extend Stone beyond the fourth amendment context. Jarrell v. Balkcom, 735 F.2d 1242, 1253 (11th Cir.1984) ("For these reasons, and because neither this circuit nor the Supreme Court have even extended Stone to Miranda claims, we refuse to extend Stone to [involuntary confession] claims."), cert. denied, __ U.S.__, 105 S.Ct. 2331, 85 L.Ed.2d 848 (1985). By holding that the federal court must make an independent determination of the voluntariness of challenged statements, Miller also impliedly rejects enlarging the Stone decision to include inquiries into the voluntariness of confessions. Miller, __U.S. at __, 106 S.Ct. at 451-54. In sum, "extension of Stone beyond its fourth amendment

roots would be a major departure from established case law." Jarrell, 735 F. 2d at 1252. We decline to make that departure.

[3] The admission of Gary Leon's testimony violated DeAngelo's fifth amendment privilege against self incrimination or his sixth amendment rights to counsel only if DeAngelo had the right to be represented by counsel at the time the conversations took place. The sixth amendment right to counsel arises when the adversarial process is set in motion, normally after an accusatory pleading is filed against the accused. United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The right, however, may attach although no accusatory plead-

ing is pending when the investigation of the crime focuses on that particular person. Escobedo v. Illinois, 378 U.S. 478, 485, 84 S.Ct. 1758, 1762, 12 L.Ed. 2d 977, 982(1964). "When the process shifts from the investigatory to accusatory--when its focus is on the accused and its purpose is to elicit a confession our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." Id. at 492, 84 S.Ct. at 1766, 12 L.Ed.2d at 987. DeAngelo claims that Escobedo is applicable in this instance because the investigation had focused on him and the intent of the police was accusatory in placing a microphone on the person of Gary Leon. He does not dispute, however, that he was under neither arrest nor police guard while in the hospital.

During the hearing before the trial court on the admissibility of the conversations the following colloquy took place between the court and the district attorney:

> The Court: Would the conversations be admissible if [investigating officer] Paduda went in and took them?
>
> Mr. Garfield [Prosecutor]: I don't think so.
>
> . . .
>
> Mr. Garfield: ...I think on May 1st DeAngelo was a primary suspect, so I think he would properly have to be advised of his rights by the police officer.

Record on Appeal, Vol. 2 at 192-93. The state also admitted that Gary Leon acted as an "agent of the police." Id., Vol.2 at 210. On the other hand, during the same hearing, DeAngelo acknowledged that Gary Leon would testify that he went to DeAngelo's room on his own accord to find out what happened to his brother, and merely was asked by the police to

wear a microphone during his conversation. Id., Vol. 2 at 202.

Whether DeAngelo was in custody, as was the case in Escobedo, thereby triggering the need for Miranda warnings, obviously is a pivotal question. The reach of Escobedo, however, has been severly curtailed by the Supreme Court. The Court explained that Escobedo actually was an effort to restrain self incrimination rather than a means to determine when the right to counsel attaches. Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1779, 16 L.Ed.2d 882, 890 (1966). It also narrowly limited the case to its facts. See Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed,2d 411, 417 (1972); Johnson, 384 U.S. at 733-34, 86 S.Ct. at 1781, 16 L.Ed.2d at 892. The Court views Escobedo as an aberration in an other-

wise unbroken chain of precedent which holds that a defendant does not have a constitutional right to counsel until adversary judicial proceedings are brought against him. Kirby, 406 U.S. at 688-89, 92 S.Ct. at 1882, 32 L.Ed.2d at 417.

[4] Neither the state trial court not the district court made any findings as to whether DeAngelo was in custody within the meaning of Escobedo when visited by Gary Leon. The Florida District Court of Appeals did note that "it is clear that DeAngelo was not in custody when Gary Leon visited him in the hospital." DeAngelo v. State, 403 So.2d 573, 575 (Fla.Dist.Ct.App.1981). Nevertheless, a remand is necessary to determine several crucial facts. It is possible, perhaps even probable, that DeAngelo, whom the state concedes was a

primary suspect when Gary Leon first visited him, became the only suspect following that conversation. If the information gleaned by Leon the first time ended the general investigation phase, as is highly possible, the second conversation was accusatory in nature and solely intended to produce an audible taped confession that would ensure DeAngelo's conviction at trial. This possibility is supported by that part of the record before us, which includes the state's admission that the police provided Gary Leon with specific questions to ask DeAngelo. Record on Appeal, Vol. 2, at 204-05. These facts, in conjunction, arguably may rise to a violation similar to that in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980)(jailed defendant's rights were

violated when police placed paid informant in defendant's cell to elicit a confession).[2]

The Supreme Court has made clear that the need for Miranda warnings is predicated on a fear that questioning conducted in a custodial setting often occurs in a coercive atmosphere conducive to confessions of an involuntary nature. See Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115(1980); Oregon v. Mathiason, 429 U.S. 492, 97

[2] Once the sixth amendment right to counsel attaches,-i.e., once the defendant is in custody-the police may not evade its strictures by means of trickery or circuitous machinations. See, e.g., Maine v. Moulton, U.S. , 106 S.Ct. 477, 88 L.Ed.2d (1985)(police violated indicted defendant's sixth amendment right to counsel by using codefendant, acting as a government informer, to record conversations with first defendant regarding defense strategy).

S.Ct. 711, 50 L.Ed.2d 714 (1977); Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The central concern is coercion-whether it be coercion by a show of force or by subterfuge. See State ex rel. Church v. De Roberts, 771 F.2d 1015, 1019 (7th Cir.1985). The conduct of the police in this case could qualify as an effort to circumvent DeAngelo's sixth and fifth amendment rights after the police had decided to arrest him.

[5] The district court did not address this issue, instead relying on its Stone v. Powell analysis and the § 2254(d) presumption. The testimony of Gary Leon is not in the record before us so it is impossible to determine at this point

whether the investigation had focused on DeAngelo at the time of the first or second visit or both. This information is pertinent to whether the conversations were "custodial interrogations" of DeAngelo with a view toward gathering incriminating evidence against him or were efforts by Leon to learn the details of his brother's death in a nonadversarial atmosphere. See, e.g., Church, 771 F.2d 1015, 1017-19 (placing incarcerated suspect's brother in suspect's cell to encourage a confession not questioning or its equivalent). On remand, these matters should be considered by the district court on the full record of DeAngelo's trial, followed by written findings of fact and conclusions of law.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-5140

RICHARD RAYMOND DeANGELO,
Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(March 21, 1986)

BEFORE: JOHNSON, Circuit Judge,
HENDERSON, Senior Circuit Judge,
ALLGOOD* Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellee is denied.
ENTERED FOR THE COURT:

United States Circuit Judge

*The Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6652-Civ-ROETTGER

RICHARD RAYMOND DE ANGELO, :

Petitioner, :

vs. :

LOUIE L. WAINWRIGHT, :

Respondent. :

REVIEW AND RECOMMENDATION

THIS CAUSE is before the Court on Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. §2254 wherein the petitioner attacks the constitutionality of his jury conviction. This matter was referred to United States Magistrate, Patricia Jean Kyle, for review and recommendation.

The petitioner presently is in the custody of the State of Florida.

In his petition, the petitioner alleges three grounds in support of his position:

1. he was denied his Fifth and Fourteenth Amendment rights because his conviction was based upon his allegedly involuntary statements;

2. the trial judge failed to determine properly that the statements were voluntary; and

3. the petitioner was interrogated and statements taken from him in the hospital without his counsel present.

The petitioner has filed a very literate and erudite 34 page typed memorandum in support of his position accompanied by numerous exhibits including a copy of his 43 page petition for writ of habeas corpus filed in the Supreme Court of Florida which is virtually identical to the petition for writ

of habeas corpus presently filed with this Court. Also accompanying the petitioner's instant petition are the briefs of appellee and appellant on appeal to the Fourth District Court of Appeal. As the petitioner challenged the motion to suppress conducted by the state court, this Court ordered and the petitioner provided the Court with transcripts from the motion to suppress which occurred during the trial and constitutes part of the trial transcript.

The respondent replied to the Court's Order to Show Cause, the petitioner responded to the respondent's response, and the petitioner then retained counsel who filed, in September of 1984, a Notice of Intent to Rely Upon Supplemental Authority and Argument.

The petitioner has raised before and the Fourth District has con-

sidered and determined the issues in the instant petition. DeAngelo v. State, 403 So.2d 573 (Fla. 4DCA 1981). The Supreme Court of Florida rejected the petitioner's petition for writ of habeas corpus. The petitioner has exhausted his available state remedies.

For the purpose of this review, the petitioner's three issues can be considered together as they deal with both the voluntariness and admissibility at trial of the petitioner's statements.

Pursuant to 28 U.S.C. §2254(d) (1976):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion or other reliable and adequate

> written indicia, shall be presumed to be correct . . . .

This presumption applies only to the extent that the factual determinations are "fairly supported by the record." Sumner v. Mata, 449 U.S. 539, 550 (1981). See, Stone v. Powell, 428 U.S. 465 (1976); Dickerson v. State of Alabama, 667 F.2d 1364, 1368 (11th Cir. 1982).

The Eleventh Circuit recently addressed this issue and held that:

> [a] federal habeas court is required by 28 U.S.C. § 2254(d) to accord a presumption of correctness to state court factual findings unless the federal habeas court finds either that one of the seven conditions set forth in § 2254(d) exists or that the state finding is not fairly supported by the record.

Hearn v. James, 677 F.2d 841, 844 (11th Cir. 1982). The seven conditions set forth in §2254(d) are:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure

employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding.

None of the above conditions is applicable to the instant petition. The petitioner had a full and fair hearing in the state court; evidence was presented in which the material facts were developed and the issues were resolved.

Although in Stone v. Powell, 428

U.S. 465 (1976), the Supreme Court addressed an issue of search and seizure, a similar analysis may be applied in this, a combined Fifth and Fourteenth Amendment argument.

The allegations of involuntary statements improperly admitted into evidence presented in the instant petition have been presented, as the record clearly indicates, to a state trial judge and appellate court. In Stone v. Powell, supra, the Supreme Court held that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the state prisoner may not be granted federal haveas corpus relief. The basic rationale underlying such a policy on the part of the federal courts applies equally in this case as to an issue involving an illegal search and seizure and is expressed in a foot-

note to that decision:

> The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respect institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v. Hunter's Lessee, 1 Wheat. 304,

> 341-344, 4 L.Ed. 97 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse." Baton, supra, n. 7, at 509.

Stone v. Powell, supra at 493 n. 35.

Thus, federal courts may review only the merits where the state has not provided this opportunity. See, Brown v. Wainwright, 574 F.2d 200 (5th Cir. 1978); O'Berry v. Wainwright, 556 F.2d 1204 (5th Cir. 1977); Wright v. Wainwright, 537 F.2d 224 (5th Cir. 1976).

In a case procedurally similar to that now before the Court, the defendant had filed a motion to suppress evidence which was denied by the trial court.

After conviction, the defendant instituted an appeal based on the suppression issue, which was likewise denied. Responding to his appeal of the denial of his petition for writ of habeas corpus filed with the United States District Court for the Southern District of Florida, the Fifth Circuit held:

> Appellant claims several violations of the fourth amendment, as applied to the states through the fourteenth amendment: lack of probable cause, lack of a neutral and detached magistrate, and use of a general warrant. While these charges, if true, would state claims under the fourth amendment, we are precluded by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), from hearing them on habeas review of a state court judgment absent any showing that the state courts did not provide appellant "an opportunity for full and fair litigation of [his] Fourth Amendment claim[s]." Id., 428 U.S. at 482, 96 S.Ct. at 3046.

Llamas-Almaguer v. Wainwright, 666 F.2d 191, 193 (5th Cir. 1982).

In the case of Graves v. Estelle, 536 F.2d 743 (5th Cir. 1977), the court held that the burden is on the petitioner to plead and prove at the federal trial level a want of opportunity fairly and fully to litigate any Fourth Amendment claim in the state court.

In the instant case, the petitioner has failed to convince this Court that it should consider the merits of the petitioner's claims. Rather, the facts here indicate that this Court not review the merits of the petitioner's claims. The petitioner raised the suppression issue in a motion before the trial court during trial, and hearing was held after which a finding was made by the court. The claims raised here were the only ones upon which the petitioner based his appeal to the Fourth District which were

considered and denied by that court. Thus, the petitioner has been provided a full and fair opportunity to litigate his claims.

However, even if the Court were to review the claims on the merits (which, obviously it has considered in order to analyze the petitioner's claims fully and fairly), the record is clear that the trial judge did consider the petitioner's arguments and made a crystal finding that the petitioner's statements were voluntary. This Court concedes to the petitioner that the trial judge did not definitively use "magic words" (as the respondent terms it in his response), but the import is clear -- that court did not permit the introduction of evidence he found to be inadmissible.

As the respondent correctly asserts:

> A trial court need not explicitly find that a challenged statement was given voluntarily. Rather, the Court's conclusion of voluntariness "must appear from the record with unmistakable clarity." Leland v. Wainwright, 569 F.2d 1371 (5th Cir. 1978).

This record is clear and does reflect, without question, that the trial judge found the petitioner's statements to have been voluntary.

Insofar as the "pure admissibility" of the statements, the issue, then, is one of an alleged error in state procedures and is therefore a matter purely of state law. As such, the issue does not rise to the level of a federal constitutional issue and thus is precluded from review by this Court.

It is well settled that questions purely of state law do not raise issues of constitutional dimension for federal

habeas corpus purposes. Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983); Llamas-Almaguer v. Wainwright, 666 F.2d 191 (5th Cir. 1982). This has been applied to the failure of state courts to adhere to their own sentencing procedures. Gryger v. Burke, 334 U.S. 728 (1948). Accord, Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); Nichols v. Estelle, 556 F.2d 1330 (5th Cir. 1977), cert. denied 434 U.S. 1020 (1978).

Last, this Court will not address the issue of the merits of the petitioner's motion to suppress. As the Court has said earlier in this opinion:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which

> the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion or other reliable and adequate written indicia, shall be presumed to be correct . . ..

Plainly, in light of applicable legal authority and the facts relating to these issues as set forth by the petitioner and the respondent, the petitioner has not met his burden of demonstrating even one of the requirements set forth under §2254(d), and this Court will not rehear the merits of the case, consider the disputed factual presentations, or rehash matters that the state courts have fully and fairly heard, considered and rejected which have not been shown, convincingly, to have been error of constitutional magnitude.

CONCLUSION

This Court has reviewed carefully the record in this matter as well as the

applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Petition for Writ of Habeas Corpus be denied as being without merit.

The parties will have ten days from the date of this Review and Recommendation in which to serve and file written objections, if any, with the Honorable Norman C. Roettger, United States District Judge.

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 21 day of December, 1984.

/S/

UNITED STATES MAGISTRATE
PATRICIA JEAN KYLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6652-Civ-ROETTGER

RICHARD RAYMOND DE ANGELO, :

Petitioner, :

vs. :

LOUIE L. WAINWRIGHT, :

Respondent. :

ORDER OF DISMISSAL

UPON review of the Recommendation of the United States Magistrate, Patricia Jean Kyle, and upon independent de novo review of the entire record herein, the findings and recommendation of the Magistrate are approved and adopted; and it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is hereby denied as being without merit.

DONE AND ORDERED at Fort Lauderdale, Florida, this 31 day of December,

1984.

/s/

UNITED STATES DISTRICT JUDGE

Richard Raymond DeANGELO,
Appellant,

v.

STATE of Florida, Appellee.

No. 79-2064.

District Court of Appeal of Florida,
Fourth District.

Sept. 9, 1981.
Rehearing Denied Oct. 7, 1981.

DOWNEY, Judge.

On June 22, 1978, the Grand Jury of Broward County indicted Richard DeAngelo for: (1) murder in the first degree by procuring Leonard Leon to commit a robbery against Narbly Keshishian, during the course of which robbery, or attempted robbery, Leonard Leon shot and killed Neil Prince with a .38 caliber pistol, and (2) robbery by procuring Leonard Leon to commit a robbery against Narbly Keshishian, during the course of which

DeAngelo carried a .30 caliber rifle.

A petit jury found DeAngelo guilty of both first degree murder and robbery while being armed with a firearm. The court entered judgments of guilty pursuant to the verdicts and imposed a life sentence as punishment for each conviction, the sentences to run concurrently. DeAngelo raises three issues on appeal from those judgments and sentences; two of these issues warrant discussion.

Regarded in the light most favorable to the verdicts, the evidence showed the following events.

By prearrangement Narbey Keshishian and Neil Prince agreed to meet Leonard Leon at a specified location to effect the purchase of a large amount of marijuana. Upon Keshishian and Prince's arrival at the location Leonard Leon took them to a large warehouse complex.

Upon entering a particular warehouse, they met DeAngelo. Keshishian asked DeAngelo: "Where's the pot?", whereupon DeAngelo asked "Where's the money?" Keshishian left the warehouse, obtained $28,000 and returned. When he reentered the warehouse Leon pulled an automatic pistol and DeAngelo drew a revolver and a rifle and ordered Leon to search Prince and Keshishian. Shortly thereafter shots were fired and Keshishian ran from the warehouse to Oakland Park Boulevard where he was picked up by Pannuccio, a partner with Keshishian and Prince in the proposed purchase. Keshishian told Pannuccio they had been ripped off and eventually Pannuccio notified the police that Prince was missing. As a result of the shooting Leonard Leon and Prince died; DeAngelo was wounded and ended up in Broward

General Hospital.

Gary Leon visited DeAngelo in the hospital to find out what happened to his brother Leonard. The police learned Gary planned to visit DeAngelo and they asked him to carry a body bug and tape any conversation with DeAngelo. At one of Gary's two hospital visits DeAngelo told Gary that he (DeAngelo) and Leonard were going to shake down Keshishian and Prince, i.e., take their money and keep the drugs. He also told him about the shooting.

At trial DeAngelo objected to the admission of either the tapes of his conversations with Gary Leon or to any testimony by Leon regarding their conversations. Thus, the first question we deal with involves the trial court's acceptance into evidence of Gary Leon's testimony concerning incriminating

statements DeAngelo had made to Gary Leon during the course of the hospital visits, at a time when DeAngelo was not in custody.

DeAngelo argues, in sum, that the trial court's reception of Gary Leon's testimony violated his rights under the Fifth and Sixth Amendments, contending he was in custody and was interrogated by Gary Leon (who was an agent of the State) without first being advised of his rights as set forth in Miranda v. Arizona, 384 U.S. 436,86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Since Gary Leon testified that DeAngelo told him, "They [DeAngelo and Leonard Leon] were going to shake these people [Prince and Keshishian] down for money and keep the drugs," it is clear that Gary Leon's testimony was extremely helpful to the State and extremely damaging to DeAngelo.

It may be that the foregoing testimony is, as the State suggests, cumulative to the testimony Keshishian gave, and therefore any error in its admission is harmless. We do not pass on the foregoing contention of the State because we do not think the trial court erred in allowing Gary Leon to give testimony concerning conversations he and DeAngelo had during Leon's two visits to DeAngelo's hospital room.

Shortly before Gary Leon testified, the defense and the prosecution had a lengthy three-way discourse with the court concerning (a) the propriety of Leon's being permitted to testify concerning his conversation with DeAngelo during visits to DeAngelo's hospital room on May 1st and Mat 3rd and (b) whether tapes made during Gary Leon's two visits to DeAngelo were admissible.

That discourse included some proffers, legal speculations, and legal argument. The prosecution conceded that, while Gary Leon made both visits to DeAngelo in order to find out for himself what has led to the death of his brother Leonard, he made the visits with the additional purpose of gaining information from DeAngelo to help the police in their investigation of the events at the warehouse. The prosecution also conceded it thought "on May 1st DeAngelo was a primary suspect," but did not describe the nature of the offense of which DeAngelo was a primary suspect. In turn, the defense conceded that at neither visit of Gary Leon to DeAngelo was there a custodial interrogation. Thereafter, the defense conceded Gary Leon would say, if asked, that he visited DeAngelo to

find out what happened to his brother and the police said, "Well, if you are going in there, do you mind us wiring you up?" At the close of the discourse, the court ruled that no tape was admissible, but that Gary Leon's testimony was admissible under Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

In order to answer the question whether the admission of Gary Leon's testimony into evidence violated DeAngelo's Fifth Amendment privilege against self incrimination or his Sixth Amendment right to counsel (the bifurcated first issue deserving discussion) we must resolve a preliminary question as to the Sixth Amendment: did DeAngelo have the right to be represented by counsel when Gary Leon visited him in the hospital on May 1st and 3rd?

[1] Normally an individual's Sixth Amendment right to counsel arises only after an accusatory pleading is filed against the individual. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Malone v. State, 390 So.2d 338 (Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla.1981); People v. Woollums, 93 Ill.App.3d 144, 48 Ill.Dec. 452, 416 N.E.2d 725 (1981). However, an individual against whom no accusatory pleading has been filed becomes an accused, in effect (and therefore entitled to representation by counsel), when a general investigation into an unsolved crime ceases and the investigation focuses on that individual. Escobedo v. Illinois, 378 U.S. 478, 485, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977, 982 (1964).

More specifically, the Escobedo court held:

> "that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' ... and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U.S. at 490-491, 84 S.Ct. at 1765, 12 L.Ed.2d at 986,

and ended its decision by stating:

> "We hold only that when the process shifts from the investigatory to accusatory-when its focus is on the accused and its purpose is to elicit a confession our adverary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

378 U.S. at 492, 84 S.Ct. at 1766, 12 L.Ed.2d at 987.

[2] In the present case neither side presented evidence that the general investigatory process had ended. Moreover, it is clear that DeAngelo was not in custody when Gary Leon visited him in the hospital, and the police did not, through Gary Leon, conduct any interrogation designed to elicit a confession from DeAngelo. Gary Leon, while stating (a) that the police knew he was visiting DeAngelo and that they told him "to keep a running conversation to gather information" and (b) that he told the police what he saw and heard during the second visit, consistently maintained his purpose in visiting DeAngelo was to find out for himself the circumstances of his brother's death. Under these circumstances the investigation was still general and had not focused on DeAngelo; thus DeAngelo did not have a right,

under Escobedo, to consult with counsel before talking with Gary Leon. Our conclusion is bolstered by the following factors.

First, after the Supreme Court of the United States announced its Escobedo decision, the Supreme Court of Florida was presented with the question of whether a confession obtained by the police pursuant to a custodial interrogation following an arrest but preceding an indictment for first degree murder and appointment of counsel was admissible against the defendant at trial. The court held that (a) the confession was admissible because it was voluntary, and (b) the police did not violate the defendant's right to counsel in obtaining the confession before counsel had been appointed, since the right to

counsel did not attach because,

> "Before a suspect has been formally charged with a crime-while the investigation processes are still going on-there is no 'criminal prosecution' [within the meaning of the Sixth Amendment] to which [the] constitutional guaranty [of the right to counsel] can attach." Montgomery v. State, 176 So.2d 331,334(Fla. 1965).

The Court distinguished Escobedo on the ground that its holding was restricted to its facts, and the facts in Montgomery were different from those of Escobedo, in that Montgomery made no request for the presence of counsel before the custodial interrogation while Escobedo had asked for counsel before his custodial interrogation and the police had denied his request. Accord:

Myrick v. State, 177 So.2d 845 (Fla. 1st DCA 1965); Dampier v. State, 180 So.2d 183(Fla. 1st DCA 1965). A plurality of the Supreme Court in Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), recognized that an individual's Sixth Amendment right to counsel does not attach until adversary judicial proceedings are brought against him, limiting the holding of Escobedo to its own facts and stating "that the 'prime purpose' of Escobedo was not to vindicate the constitutional right to counsel as such, but, like Miranda, 'to guarantee full effectuation of the privilege against self-incrimination....'" 406 U.S. at 689, 92 S.Ct. at 1882, 32 L.Ed.2d at 417. Based on the foregoing authorities and on People v. Woollums, 93 Ill.App.2d 144, 48 Ill. Dec. 452, 416 N.E.2d 725 (1981)(which

relied on Kirby v. Illinois), we hold that DeAngelo's right to counsel did not attach until he was indicted for murder and robbery, and therefore DeAngelo had no Sixth Amendment right to counsel at the time of Gary Leon's visits to him at the hospital. Since DeAngelo had no Sixth Amendment right to counsel during the visits, the admission into evidence of Gary Leon's testimony concerning statements DeAngelo made during those visits could not infringe upon DeAngelo's constitutional right to counsel.

Second, United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), upon which DeAngelo primarily relies, does not support his position that the admission of Gary Leon's testimony into evidence infringed his Sixth Amendment right to counsel. It

seems to us that the Supreme Court reversed Henry's robbery conviction because the government, by paying (on a contingency basis) Henry's cellmate to insinuate himself into Henry's confidence and deliberately engage Henry in conversation to secure incriminating information, "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without the assistance of counsel, [and thereby] ... violated Henry's Sixth Amendment right to counsel." 447 U.S. at 275, 100 S.Ct. at 2189, 65 L.Ed.2d at 125.

None of the foregoing circumstances is present in the case before us. The record shows the police did not intentionally create a situation likely to induce DeAngelo's presence in the hospital was fortuitous; DeAngelo was not

in custody; Gary Leon's visits were voluntary; DeAngelo knew Gary Leon; and Gary Leon did not deliberately engage DeAngelo in conversation to secure incriminating information. The record shows no infringement of DeAngelo's right to counsel.

[3] The second part of the first issue is whether the admission of Gary Leon's testimony infringed DeAngelo's privilege against self-incrimination. We hold that no Fifth Amendment violation occurred during the Gary Leon-DeAngelo conversations because when Leon visited and spoke with DeAngelo no one exercised any coercion over DeAngelo, and DeAngelo's statements were purely voluntary. Since there was no compulsion, DeAngelo's Fifth Amendment privilege against self-incrimination was not violated. Odom v. State,

403 So.2d 936 (Fla. 1980). We conclude that the trial court acted properly in admitting Gary Leon's testimony concerning incriminating statements DeAngelo voluntarily made to Leon.

[4] The other questions deserving discussion is whether the robbery conviction and the life sentence imposed therefor were proper.

As indicated above, the first degree murder charge was based solely on the felony-murder rule. The indictment contains no language that would support a premeditated murder charge. Therefore, the State could prove first degree murder only by showing that the homicide of Prince took place during the perpetration or attempted perpetration of a robbery.

Florida law relative to convictions

and sentences for felonies underlying first degree murder convictions under the felony-murder rule has been in a state of flux for quite some time. The latest pronouncement of our Supreme Court on the subject is that when the sole basis for a first degree murder conviction is an unpremeditated homicide committed during the commission of a specified class of felonies, the defendant may be sentenced for the murder; in addition he may be convicted of the underlying felony, but the trial court may impose no penalty pursuant to the conviction for the underlying felony. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). Accordingly, we affirm the judgment of guilty of robbery but quash the life sentence imposed pursuant to the robbery conviction.

For the forgoing reasons we affirm the judgment of guilty of first degree murder, the life sentence entered thereon, and the judgment of guilty of robbery. However, we quash the sentence entered upon the robbery conviction and we remand the cause with directions that the trial court vacate the life sentence for the robbery conviction.

AFFIRMED IN PART: REVERSED IN PART: and remanded with directions.

LETTS, C.J., and ANSTEAD, J., concur.

Excerpt from the Evidentiary Hearing on Respondent's Motion to Suppress, Argument of Charles J. Rich, Respondent's trial counsel:

MR. RICH: Basically it's Miranda law. He is trying to extract a confession since he's a prime suspect by their own admission. At this point, even though it's not a custodial interrogation, they have a duty under Escobedo and Miranda to advise that whatever he says may be used in a court of law against him.

Transcript of trial proceedings, at 795.